CHONG TON SIN & ORS v. MENTERI DALAM NEGERI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[JUDICIAL REVIEW NO: WA-25-53-02-2021]
14 SEPTEMBER 2022

Abstract – *In a matter where freedom of expression and/or where fundamental liberties are being stifled, a reasoned decision must be given. Otherwise, it will violate the principles of procedural fairness guaranteed by art. 8 of the Federal Constitution.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Application by author and publisher against decision of Minister of Home Affairs in imposing ban against publication of book – Book on homosexuality from Christian's perspective – Whether book likely to be prejudicial to public order, morality and public interest – Whether ban illegal – Whether book form of expression protected by art. 10(1)(a) of Federal Constitution – Whether ban irrational, disproportionate and excessive – Whether applicants denied right to be heard – Printing Presses and Publications Act 1984, s. 7(1)*

CONSTITUTIONAL LAW: *Fundamental liberties – Right to be heard – Application by author and publisher against decision of Minister of Home Affairs in imposing ban against publication of book – Book on homosexuality from Christian's perspective – Whether applicants denied right to be heard – Whether there was violation of procedural fairness – Federal Constitution, arts. 5(1) & 8(1)*

This judicial review application was filed by the applicants against the decision of the Minister of Home Affairs ('first respondent') in imposing a ban against the publication of a book entitled 'Gay is OK!: A Christian Perspective' ('book'). The second applicant was the author of the book and it was published by the first applicant. The first respondent had ordered that the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of the book be absolutely prohibited throughout Malaysia on the ground that the book was likely to be prejudicial to public order, morality and public interest ('order'). The decision was made under s. 7(1) of the Printing Presses and Publications Act 1984 ('Act'). The applicants requested the first respondent to revoke the order but there was no reply from the first respondent. The applicants contended that: (i) the ban was illegal as the book was a form of expression protected by art. 10(1)(a) of the Federal Constitution ('FC'); (ii) the book was unlikely to be prejudicial to public order, morality and public interest; (iii) the ban was a disproportionate fetter to the applicants' freedom of expression and right

to equal treatment; (iv) the ban was irrational, disproportionate/excessive because the first respondent failed to take into account relevant considerations; and (v) there was a procedural impropriety as the applicants were not given the right to be heard before the ban which went against the right to be heard guaranteed under the doctrine of legitimate expectation. The first respondent, on the other hand, submitted that (i) the contents of the book as a whole and contextually defend, promote and encourage homosexuality which was likely to be prejudicial to public order, morality and public interest; (ii) the ban was in accordance with the law and not tainted with illegality, irrationality and unreasonableness; and (iii) there was no duty on the part of the first respondent to afford an opportunity to be heard to the applicants prior to the imposition of the ban.

Held (allowing application):

(1) The first respondent relied on the public's response and reaction every time when issues of homosexuality arose. The averments made by the first respondent could not be sustained in relation to the book. The book had been in publication for seven years since September 2013 without any evidence of untoward incidents relating to the book. In fact, the book had previously been in publication on Malaysiakini news portal between September 2010 and April 2011. No evidence was adduced to show any reports by any party stating that the book was likely to pose a threat to public order or for that matter, to public morality or public interest. Therefore, the response by the public in regard to the issues of homosexuality was irrelevant where the book herein was concerned. The incidences referred to by the first respondent relating to the public's response had no connection with the book. The incidences also did not show any disruption to the even tempo of the life of the community or public safety and tranquillity. The first respondent failed to justify the ban on the grounds that the book was likely to cause prejudice to public order under s. 7(1) of the Act. (paras 18, 19 & 23)

(2) Subjective assessment of the book differed from one person to another person. The applicants must be given the right to be heard before the ban, more so, when the book related to a religion where the first respondent could not be said to be an expert on the subject. It could not be disputed that the applicants had the constitutional right to be heard (*audi alteram partem*) and the rule against bias (*nemo judex in causa sua*). The first respondent ought to give the applicants a case to explain the context of the 'significant passages' and why the book should not be banned before the prohibitory order was issued. Additionally, the right to be heard was also guaranteed under the doctrine of legitimate expectation. The FC had ensured that the fundamental liberties of

Malaysians are guaranteed in arts. 5 to 13, which encompassed the basic human rights principles as stated in the Universal Declaration of Human Rights. The ban was indefensible and the applicants' right to be heard had been violated. (paras 34, 38 & 40)

(3) The time has come for the public decision-making body to accept and realise that it is a settled principle of public law and natural justice for them to give reasons for their decisions. Procedural fairness is part of our law because of the terms of arts. 5(1) and 8(1) of the FC. (para 41)

Case(s) referred to:

CAS v. MPPL & Anor [2019] 2 CLJ 454 CA ***(refd)***

Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300 FC ***(refd)***

Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia) [2012] 9 CLJ 297 CA ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal [1997] 1 CLJ 665 CA ***(refd)***

Islamic Renaissance Front Bhd v. The Minister Of Home Affairs [2019] 1 LNS 903 HC ***(refd)***

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 LNS 72 FC ***(refd)***

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***

Minister Of State For Immigration And Ethnic Affairs v. Ah Hin Teoh (1995) 128 ALR 353 ***(refd)***

Mohd Faizal Musa v. Menteri Keselamatan Dalam Negeri [2018] 9 CLJ 496 CA ***(refd)***

N Radhakrishnan @ Radhakrishnan Varenickat v. Union Of India And Others [2018] 7 MLJ 628 ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar [2020] 1 CLJ 1 FC ***(refd)***

Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor And Another Appeal [2015] 2 CLJ 328 CA ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2006] 1 CLJ 139 CA ***(refd)***

Zi Publications Sdn Bhd v. Timbalan Menteri Dalam Negeri & Ors [2014] 2 MLRH 708 ***(refd)***

Legislation referred to:

Federal Constitution, arts. 5(1), 6, 7, 8(1), 9, 10(1)(a), 11, 12, 13
Human Rights Commission of Malaysia Act 1999, s. 4(4)
Penal Code, ss. 377A, 377B
Printing Presses and Publications Act 1984, s. 7(1)

For the applicants - Edmund Bon Tai Soon & Michael Cheah Ern Tien; M/s Amerbon
For the respondents - Mohammad Sallehuddin Md Ali, FC

Reported by Lina E

JUDGMENT

Noorin Badaruddin J:

[1] This judicial review application is filed by the applicants against the decision of the first respondent in imposing a ban ("the ban") against the publication of a book published by the first applicant in September 2013 where the second applicant is the author of the book. The decision was made pursuant to s. 7(1) of the Printing Presses and Publications Act 1984 (Act 301) ("the Act") *via* Printing Presses and Publications (Control of Undesirable Publications) (No. 3) Order 2020.

Background Facts

[2] The first applicant is a sole proprietor trading as Gerakbudaya Enterprise who had published the book entitled "Gay is OK!: A Christian Perspective" ("the book") in September 2013. The second applicant is the author of the book.

[3] On 17 November 2020, the first respondent as the Minister of Home Affairs responsible under the Act had ordered that the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of the book be absolutely prohibited throughout Malaysia on the ground that the book is likely to be prejudicial to public order, morality and public interest ("the order").

[4] The applicants came to know of the ban from online media reports published on 18 December 2020 following a media statement issued by the Chief Secretary of the Ministry of Home Affairs on the same day.

[5] The applicants through their solicitor's letter dated 2 February 2021 requested the first respondent to revoke the order. There was no reply from the first respondent.

Summary Of The Applicants' Contentions

[6] In gist, these are the applicants' contentions:

(i) The ban is illegal as the book is a form of expression protected by art. 10(1)(a) of the Federal Constitution ("FC");

(ii) The book is unlikely to be prejudicial to public order, morality and public interest;

(iii) The ban was a disproportionate fetter to the applicants' freedom of expression and right to equal treatment;

(iv) The ban is irrational, disproportionate/excessive because the first respondent failed to take into account relevant considerations and had instead taken into account irrelevant considerations;

(v) There is a procedural impropriety as the applicants were not given the right to be heard before the ban which goes against the right to be heard guaranteed under the doctrine of legitimate expectation.

Summary Of The Respondents' Contentions

[7] In essence, the first respondent found that the contents of the book as a whole and contextually defend, promote and encourage homosexuality which is likely to be prejudicial to public order, morality and public interest. The ban is submitted to be in accordance with the law and not tainted with illegality, irrationality and unreasonableness. It is the first respondent's position that there is no duty on the part of the first respondent to afford an opportunity to be heard to the applicants prior to the imposition of the ban.

Findings

[8] In exercising its supervisory power in judicial review, the court in general is to determine whether the law is being obeyed or otherwise by the decision-making authority in question. So long as the decision is reached in accordance with law, the general rule is that the court's own view on the correctness of such decision is outside the province of judicial review. In addition, the court is reminded that its power to interfere in matters relating to the exercise of discretion by the Minister or a public authority is not an appellate authority to override the decision but as a judicial authority to see whether the Minister or a public authority has contravened the law.

[9] It must be taken as trite as well that no discretion conferred by law upon a public body, public authority or public officer is unfettered and left unchecked. In the case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, Raja Azlan Shah CJ (as His Majesty then was) explained the following:

> In particular, *it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably.* In other words, *every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression.* In these days when Government departments and public authorities have such great powers and influence, *this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.* I would once again emphasise what has often been said before, that *"public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place"*, (per Danckwerts LJ in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434 442).
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> (emphasis added)

[10] Turning to the instant matter, this court has read the book. The book is divided into two parts. The first part is a compilation of articles written by the second applicant which had previously been published in Malaysiakini, a Malaysian news portal between September 2010 and April 2011.

[11] Part two contains ten chapters written by the second applicant on the Bible and homosexuality.

[12] Having read the book, this court shares the same view by the applicants that in summary, the book provides an alternative view from a Christian perspective on whether homosexuality must be opposed. It can be discerned that the second applicant as the author of the book takes the view that there is sufficient basis from a Christian point of view that serves to dismantle the so-called stereotypes that all Christians must oppose homosexuality.

[13] Section 7(1) of the Act provides that the first respondent may in his absolute discretion by order prohibit either absolutely or subject to such conditions as may be prescribed any printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of publication and future publications of the publisher concerned if the Minister is satisfied that the contents of the publication is in any manner prejudicial to or likely to be prejudicial to public order, morality, security or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest. Section 7(1) of the Act is reproduced:

> (1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned

[14] In the instant case, the first respondent had exercised his absolute discretion to impose the ban upon being satisfied that the book contains contents which are likely to be prejudicial to public order, morality and public interest. In his affidavit, the first respondent has averred that he found the contents of the book as a whole and contextually to be promoting, defending and encouraging homosexuality. It must be emphasised that in imposing the ban under s. 7(1) of the Act, the ground relied upon by the first

respondent is that the contents of the book are likely to be prejudicial and not prejudicial to the public order where both carries different meaning. On behalf of the respondents, learned Federal Counsel argued that if it is likely to be prejudicial to public order, it would cover anything which has the potential to disrupt public order. It is submitted that where "likely to be prejudicial to public order" it is sufficient to show the potentiality of the prejudice. In support, the learned Federal Counsel refer to the Court of Appeal decision in *Mohd Faizal Musa v. Menteri Keselamatan Dalam Negeri* [2018] 9 CLJ 496; [2018] 3 MLJ 14.

[15] In *Mohd Faizal Musa* (*supra*), Zaleha Yusof JCA (as she then was) in delivering the judgment on behalf of the Court of Appeal had stated that if it is "likely to be prejudicial to public order", the facts need to be examined to see whether there was any convincing evidence for such potential to happen. The relevant passage of the judgment is quoted:

> [24] **If we go by 'it is likely to be prejudicial to public order', the facts need to be examined to see whether there is any convincing evidence for such potential to happen.** The learned High Court judge, with due respect, did not explain what is 'the potential'. In para. 36 of her grounds of judgment Her Ladyship merely quoted paras. 10 and 14 of the decision of this court in *Arumugam*'s case, and concluded in para. 37 of her grounds of judgment that the impugned order does not suffer from illegality since the reasoning offered in the Minister's affidavit were in fact based on public order grounds. Learned senior federal counsel had also urged us to follow this decision as he contended that the four books have the potential to disrupt the even tempo of the life of the community.
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> (emphasis added)

[16] It must be borne in mind that the "satisfaction" of the first respondent under s. 7(1) of the Act is to be reviewed based on an objective test. In *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300; [2010] 3 MLJ 307, the Federal Court through the judgment of Gopal Sri Ram FCJ (as he then was) had elaborated on how the Minister's "satisfaction" in arriving at his decision is to be determined as follows:

> [4] It is to be noted that the section says *'if the Minister is satisfied'. The first question that has to be determined is whether that phrase imports a subjective or an objective element* A similar statutory formula came up for consideration in *Merdeka University Berhad v. Government of Malaysia* [1982] 2 MLJ 243. There the words used by the statute were 'If, the Yang dhPertuan Agong is satisfied'. In interpreting that statutory formula, Suffian LP said:
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> > It will be noted that s. 6 used the formula 'If the Yang di-Pertuan Agong is satisfied etc.' In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned judge, *administrative law has since so far advanced such*

A *that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable* – see the cases cited by the learned judge at p. 360.

B In the same case, Abdoolcader J at first instance had this to say:

It has been suggested in the past that the qualification of the statement of a power by introductory words in the form of a subjective formula such as His Majesty's satisfaction on the matters specified in s. 6(1) of the 1971 Act might be sufficient to exclude judicial review, but *the modern and correct view clearly is for an objective approach to the formula to be preferred and this means that the discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds.*

D [5] Adopting this test which apart from being binding precedent is the correct statement of the law, in the present instance *it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were* E *prejudicial to public order.*

[6] There is a principle of ancient repute that:

… where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied. Reg v. Secretary of State for the Home F *Department, ex p Khawaja and other appeals* [1984] AC 74, per Lord Scarman.

And as Lord Kingarth observed in *Cameron v. Gibson* [2005] CSIH83:

Equally, the fact that the order may have been made by reason of G a mistake In fact or law cannot affect the conclusion that the order was one made *ultra vires … when power is given by Parliament to administrative bodies or tribunals to act in limited circumstances, it is well-established that such bodies cannot, by their own mistake of fact or law in relation to matters circumscribing the limits of their powers, give themselves powers which they do not have …* (emphasis added)

H **[17]** It brings this court now to the central question whether the publication of the book is likely to be prejudicial to public order. In this regard, the first respondent avers as follows:

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14(f) ... sekiranya buku tersebut tersebar luas dan tular di kalangan masyarakat ia berpotensi untuk membawa kepada bantahan sehingga ke tahap perhimpunan atau demostrasi secara besar-besaran yang boleh mencetuskan kekecohan dan kekerasan sehingga menimbulkan pergaduhan serta pertumpahan darah di kalangan rakyat yang berbilang kaum dan agama di Malaysia.

[18] In making such averment as stated in the above, it is clear that the first respondent relies on the public response and reactions every time when issues of homosexuality arise. The first respondent avers:

14(d) Penolakan masyarakat di Malaysia terhadap amalan atau budaya homoseksual yang disifatkan sebagai tidak bermoral dapat dilihat berdasarkan respons masyarakat setiap kali timbulnya isu berhubung dengan LBGT di Malaysia apabila rata-ratanya membantah amalan atau budaya homoseksual dan menggesa Kerajaan untuk mengambil tindakan terhadap perkara tersebut dan terdapat bantahan yang dibuat sehingga ke tahap penganjuran perhimpunan secara besar-besaran. Sesalinan laporan-laporan dan artikel-artikel daripada akhbar-akhbar dalam talian berhubung dengan perkara ini dilampirkan bersama di sini ...

[19] This court is of the considered view that the averments made by the first respondent cannot be sustained in relation to the book. It cannot be factually disputed that in the instant case, the book has been in publication for seven years since September 2013 without any evidence of untoward incidents relating to it (the book). It has been highlighted that in fact the book had previously been in publication on Malaysiakini news portal between September 2010 and April 2011. No evidence is adduced to show any reports by any party stating that the book is likely to pose a threat to public order or for that matter to public morality or public interest. Therefore, the response by the public in regard to the issues of homosexuality is irrelevant where the book herein is concerned. The incidences referred to by the first respondent relating to the public response has no connection with the book. The incidences also do not show any disrupt to the even tempo of the life of the community, or public safety and tranquillity.

[20] In *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* [2012] 9 CLJ 297; [2012] 6 MLJ 340, the Court of Appeal in holding that the Minister's decision to ban the book was flawed and not exercised in accordance with s. 7(1) of the Act had stated:

[19] That submission was followed with the further submission that the learned judge erred in confining his consideration to prejudice to public order and failed to appreciate the wider meaning of 'prejudicial to public order'. We find this submission to be an exercise of superficial labelling and equally without merit If no evidence of actual prejudice to public order was produced, the conclusion must be that no prejudice to public

order had occurred. **If in the two years that the book was in circulation no prejudice to public order had occurred, it follows that the book was in the first place unlikely to be prejudicial to public order.**

(emphasis added)

[21] Further, there is no evidence to show how many copies of the book had been printed, published or circulated before it was banned. The Court of Appeal in *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor And Another Appeal* [2015] 2 CLJ 328 in adopting the decision in *SIS Forum (Malaysia)* (*supra*) had stated:

> [45] In the course of submissions, we have been told that 4,000 copies of 1 Funny Malaysia and 11,500 copies of Perak Darul Kartun had been printed before the banning order was made. *There does not appear to be any evidence on record on how many copies had been sold before this,* although the statement under O. 53, r. 3(2) filed by the appellants speak of "brisk sales". *What is clear is that both publications were in circulation before they were banned*. In the case of Perak Darul Kartun, the publication had been in circulation some eight months before, and in the case of 1 Funny Malaysia, the cartoons had been published online over time and were in circulation for about three years. *This general factual scenario therefore appears somewhat similar to that found in SIS Forum (Malaysia) v. Dato' Seri Syed Hamid Syed Jaafar Aibar (Menteri Dalam Negeri) [2012] 9 CLJ 297; [2010] 2 MLJ 377 (High Court), where the prohibited book (a collection of essays) was in circulation for two years before its banning.* A different panel of this Court heard the appeal by the Minister against the High Court decision, reported as *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri v. SIS Forum (Malaysia)* [2012] 9 CLJ 297; [2012] 6 MLJ 340, *and held that if the book had been in circulation for two years and no prejudice to public order had occurred, it must follow that it was in the first place unlikely to have been prejudicial to public order. Indeed, the Court of Appeal by a unanimous decision went on to further hold that in these circumstances, for the Minister to be satisfied that its publication was likely to be prejudicial to public order was so outrageous and in defiance of logic as to fall squarely within the Wednesbury unreasonableness test.* (emphasis added)

[22] In *Mohd Faizal Musa* (*supra*), the books in question were banned on the grounds that they were "likely to be prejudicial to public order and security". The books were already in circulation in the market between four to seven years before the ban, and no prejudice to public order had occurred. The Court of Appeal in following *SIS Forum* (*supra*) had held that the books were unlikely to be prejudicial to public order. The court states:

> [32] The difference between the prohibition orders in *SIS Forum*, and *ZI Production*, with the instant order is that in the former the orders state 'is prejudicial' while in this instant case it says 'is likely to be prejudicial'. Of course it is easier to interpret the words 'is prejudicial' because it connotes the actual and current occurrence of public disorder which is not in evidence in this case. But the words 'is likely' show it has potential to

happen, might happen or probably to happen. See: *Concise Oxford English Dictionary* (12th Ed, 2011). *We opine as it is potentially or probably to happen, the answer to a question of whether the four books are likely to be prejudicial to public order must be based on the facts of the case. The facts of the instant case show that the four books had been in circulation for many years, between four to seven years before the order. Thousands of copies had been printed and some are even published in Government's related periodical or publication and even kept in the National Library.* Some had even won writing awards. Looking through the evidence as presented before us, so far, until the date of the order there had not been the slightest evidence of public disorder that had occurred.

Hence, if in the many years the four books were in circulation no prejudice to public order had occurred, to borrow the words of this court in SIS Forum, it follows that the four books were in the first place unlikely to be prejudicial to public order. After all these years, for the respondent to suddenly say that he was satisfied that the four books are likely to be prejudicial to public order and that 'suatu keputusan dan tindakan segera harus dilaksanakan bagi menyekat 4 Buku tersebut ...' 'is in such outrageous defiance of logic that it falls squarely within the meaning of *Wednesbury* unreasonableness, and of rationality'. See *SIS Forum*. (emphasis added)

[23] This court finds that the first respondent has failed to justify the ban on the ground that the book is likely to cause prejudice to public order under s. 7(1) of the Act. After more than seven years of the publication of the book, the first respondent fails to show evidence of actual prejudice to public order that had occurred. When no such evidence is adduced, it follows that the book was in the first place unlikely to be prejudicial to public order.

[24] The next question is whether the book is prejudicial to morality. The first respondent avers that:

Fakta bahawa homoseksualiti ialah suatu amalan atau budaya yang disifatkan sebagai tidak bermoral dan tidak diterima di Malaysia juga diiktiraf dari segi perundangan berdasarkan undang-undang yang digubal, antara lain, berhubung dengan perbuatan seks luar tabii dalam Kanun Kesiksaan.

[25] It can be understood from the above averment, the first respondent must be referring to the offence of carnal intercourse against the order of nature under s. 377A and the punishment under s. 377B of the Penal Code. Section 377A of the Penal Code is focused on the abnormality of such sexual conduct, not the prohibition of male homosexual relations or identities *per se*. The popular association between s. 377A of the Penal Code and homosexuality is thus a curious one but it is clear that the provision is not gender specific and does not make a person criminally liable merely because of his or her sexual orientation.

[26] In *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2006] 1 CLJ 139; [2006] 1 MLJ 727, the Court of Appeal had dealt with the meaning of morality in the following excerpts of the report:

> As to the word 'morality' itself, we would subscribe to the view that it be given a broad, liberal and extensive meaning, may be wider than merely good values. However, in the absence of any definition to the word 'morality' in the FC it should be given its ordinary meaning. Judicial authority for this proposition can be found in the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Bosar, Pulau Pinang v. Utra Badi* [2001] 2 MLJ 417 where Abdul Malek Ahmad FCJ (as he then wasj in relation to the issue of the right to be heard, expressed thus:
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> > The word 'heard' in cl. 2 of art. 135 of the Constitution and in para. 27 of Cap D is derived from the word 'hear' which is not defined in the constitution which governs this matter; in view of that we think that it should be given its ordinary everyday meaning.
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> In order to know its ordinary meaning, reference is made to the *New Shorter Oxford English Dictionary on Historical Principles* by Lesley Brown Volume 1 which defines morality to include:
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> > The doctrine or branch of knowledge that deals with right and wrong conduct and with duty and responsibility; moral philosophy, ethics. (see also *Black's Law Dictionary* (7th Ed) p. 1025).
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> *Morality therefore has a wider import of interpretation since ethics cover almost every aspect of the human conduct.* Negative essence, for instance, being partial in adjudicating a dispute, is considered unethical and wrong. The quality of being impartial and independent has always been the trademark of the legal fraternity (see for example r. 5 of the Legal Profession (Practice and Etiquette) Rules 1978 which provides that no advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.
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> In giving a wide meaning to the word 'morality' in *Manohar v. State of Maharashtra* AIR 1984 Bombay 47, the learned judge held (at p. 57):
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> > *The word 'morality' has not been defined in the Constitution. To our mind, morality contemplated by cl. (4) of art. 19 is in the nature of public morality and it must be construed to mean public morality as understood by the people as a whole.*
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> Further in the judgment his Lordship continued:
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> > In *Brij Gopal*'s case (AIR 1979 Madh Pra 173), the Madhya Pradesh High Court held that the word 'morality 1 which occurs in cll. (2) and (4) of art. 19 means ideas about right and wrong which are accepted by the right thinking members of the society as a whole of the country. *While recognising that 'morality' is a fluid concept, and its content will depend upon the time, place and stage of civilization, the court*

rejected the contention that the word 'morality' in art. 19 should be restricted to sexual morality. We are in respectful agreement with the view taken by the Madhya Pradesh High Court that the word 'morality' occurring in art. 19(4) is not restricted to sexual morality. (emphasis added)

[27] The response by the members of the society and the incidences that happened as averred to by the first respondent cannot be accepted to be representing an accepted view of either right or wrong by the right-thinking members of the society as a whole of the country in the recent times.

[28] Pertinently, the first respondent fails to adduce evidence that the views amongst the different religious and diverse cultural segments of the society have been taken into consideration. At most, the incidences referred to by the first respondent in the affidavit represent views of limited group of persons or individuals of a particular religion which is in no way represents the Malaysian society as a whole.

[29] The first respondent's averment that homosexuality is a practice or culture unacceptable by the entire society of Malaysia and that it is an offence in all religions in this country is unsupported. Given that the book in question is only in relation to homosexuality from a Christian perspective, it should have just been confined to that specific religion. Interestingly, the applicants have provided with an expert opinion report prepared by one Mr. Wan Wei Hsien, an Adjunct Lecturer (Religion and Philosophy) at Methodist College, Kuala Lumpur who lectures in Theology and Religion with an academic expertise in the areas of the New Testament (Christian Bible) and the development of early Christianity. The expert's unrebutted opinion is contrary to the first respondent's contention where Mr. Wan Wei Hsien in his expert report states that:

> Within Christianity, there has historically existed, and still exists, a diversity of opinion regarding homosexuality. As such, the statement that "Christianity prohibits homosexuality" is reductionistic and therefore false.

[30] It must be noted that the first respondent admitted in his second affidavit in reply dated 5 October 2021 that his findings regarding the contents of the book were based on his own examination of it as a layperson from his reading of the contents. It can be gleaned that the first respondent's findings were effectively grounded on what he thought of it and nothing more. The decision of the Federal Court in *Darma Surian* (*supra*) must be reiterated. The Federal Court had stated that:

> "[i]t is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order". The "court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order".

[31] The Indian Supreme Court in *N. Radhakrishnan @ Radhakrishnan Varenickat v. Union of India and Others* [2018] 7 MLJ 628, SC (India) heard a writ petition seeking to ban a novel which appeared in a popular weekly published in certain Indian states and circulated throughout the country and abroad, it was on the grounds that a portion of the book which was published in the weekly was indecent and offended the sentiments of women of a particular faith. It was also argued that the said publication in the weekly has the tendency and potential to "disturb the public order, decency or morality and it defames the women community, all of which are grounds for the State to impose reasonable restrictions under art. 19(2) on the fundamental right of freedom of speech and expression". The Supreme Court held that the book should not be read in a fragmented matter. It must be read as a whole and understood from an objective point of view. The subjective perception of the book cannot be allowed to enter the legal arena for censorship or ban of a book. The Supreme Court perused the book and found no issue with the impugned portion of the book. The writ petition was dismissed. The relevant paragraphs of the judgment are as follows:

> 37. If books are banned on such allegations, there can be no creativity. Such interference by constitutional courts will cause the death of art. *True it is, the freedom enjoyed by an author is not absolute, but before imposition of any restriction, the duty of the Court is to see whether there is really something that comes within the ambit and sweep of Article 19(2) of the Constitution.* At that time, the Court should remember what has been said in *S. Rangarajan v. P. Jagjivan Ram and Others* (1989) 2 SCC 574 : LNIND 1989 SC 196 wherein, while interpreting Article 19(2), this Court borrowed from the American test of clear and present danger and observed:
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> 45. ... *Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a power keg".*
>
> 38. *To apply the said litmus test, it is to be borne in mind that a book should not be read in a fragmented manner. It has to be read as a whole. The language used, the ideas developed, the style adopted, the manner in which the characters are portrayed, the type of imagery taken aid of for depiction, the thematic subsidiary concepts projected and the nature of delineation of situations have to be understood from an objective point of view. There may be subjective perception of a book as regards its worth and evaluation but the said subjectivity cannot be allowed to enter into the legal arena for censorship or ban of a book.*
>
> 39. Quite apart from the above, the creativity and the author's perception of the universe are to be borne in mind. What is true to poetry is applicable to novels or any creative writing. It has to be kept upper-most

in mind that the imagination of a writer has to enjoy freedom. It cannot be asked to succumb to specifics. That will tantamount to imposition. A writer should have free play with words, like a painter has it with colours. The passion of imagination cannot be directed. *True it is, the final publication must not run counter to law but the application of the rigours of law has to also remain alive to the various aspects that have been accepted by the authorities of the Court. The craftsmanship of a writer deserves respect by acceptation of the concept of objective perceptibility.*

40. *It ought to be remembered that eventually, what the great writer and thinker Voltaire had said "I may disapprove of what you say, but i will defend to the death your right to say it" becomes the laser beam for guidance when one talks about freedom of expression.* (emphasis added)

[32] There must be evidential basis for the first respondent's justification of the ban. In *Sepakat Efektif* (*supra*), the Court of Appeal had held that that the alleged "anticipated danger should not be remote, conjectural or far-fetched, and that it should have proximate and direct nexus with the expression, such that the expression of thought should be intrinsically dangerous to the public interests".

[33] In stating that the contents of the book were examined and read, this court observes that the first respondent had in fact dissected the significant excerpts of the book said to be likely to be prejudicial to public order, morality and public interest. It is of the considered view that this approach cannot tantamount to an objective assessment. The applicants on the other hand contend that the first respondent's findings did not represent the actual meaning of the passages and paragraphs. It is averred by the applicants that the texts giving context to the passages and paragraphs are said to have been omitted by the first respondent. The applicants further contend that the "significant passages" stated by the first respondent cannot be said to be "significant" because they were only from 42 out of 226 pages of the book and that cannot be said to be representative of the entire book.

[34] All these contentions by the parties herein reinforce the notion that subjective assessment of the book differs from one person to person. This is where this court is of the view that the applicants must be given the right to be heard before the ban more so when the book relates to a religion where the first respondent cannot be said to be an expert on the subject, it cannot be disputed that the applicants have the constitutional right to be heard. The principles of natural justice includes the right to be heard ("*audi alteram partem*") and the rule against bias ("*nemo judex in causa sua*"). The former means that before punishment is meted out against a person that person ought to be given a chance to be heard while the latter means that the person making the decision should not be bias in the process of decision making. The same would apply to the present matter where it is of the considered

A view that the first respondent ought to give the applicants a case to explain the context of the "significant passages" and why the book should not be banned before the prohibitory order is issued.

[35] The fundamental rules of natural justice which includes the right to be heard are canvassed under arts. 5(1) and 8(1) of the FC and had been B discussed by the Federal Court in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; [1977] 2 MLJ 152, FC and *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750, FC.

[36] In *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2020] 1 CLJ 1; [2020] 1 MLJ 141, the Federal Court C in addressing the issue of breach of fundamental right *ie*, the right to be heard has stated the followings:

> [57] *The importance of the principle of audi alteram partem cannot be overemphasised; it affords an aggrieved person the opportunity to participate in the decision that will affect him or her by influencing the outcome of the decision. The* D *participation of an aggrieved person in the process of decision-making constitutes a safeguard that not only signals respect for the dignity and worth of the participants but improves the quality and rationality of administrative decision-making and further enhances its legitimacy.*
>
> [58] *The audi alteram partem principle is now well recognised and established in* E *its application to the decisions of administrative authorities as well as judicial and quasi-judicial tribunals (see Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MLJ 152).* (emphasis added)

[37] In *Islamic Renaissance Front Bhd v. The Minister Of Home Affairs* [2019] 1 LNS 903; [2020] 5 MLJ 399, the respondent had issued three orders F prohibiting the publication, printing, importation, production, reproduction, sale, issuance, circulation, distribution and possession of three books published by the appellant on the ground they were likely to prejudice public order, alarm public opinion and prejudice public interest. The respondent informed the appellant that the orders were issued after consideration of G reports from the Jabatan Kemajuan Islam Malaysia ('Jakim') and the Publication and Quranic Text Control Division ('the Division') which, *inter alia*, stated that the publications contained matters which deviated from the teachings of Islam as practised in Malaysia. The Court of Appeal held that the failure to give the appellant the right to be heard rendered the H respondent's orders under s. 7(1) of the Act indefensible. The Court of Appeal through the judgment of His Lordship Abu Bakar Jais JCA stated the followings:

> [43] The High Court judge erred in quoting the passage in Lee Kew Sang above to find right of hearing is not a procedural requirement for the I appellant in the present appeal. With respect, the learned High Court judge erred in this respect because first as pointed out, the procedural requirement mentioned in Lee Kew Sang is not about the right of hearing.

Second, the learned High Court judge was also wrong to generally find that once there is no statutory provision granting the right of hearing, such right can be denied. And His Lordship had based this on Lee Kew Sang. This reliance on this Federal Court's case for such proposition of the law is with respect inappropriate. This is because in Lee Kew Sang, the Federal Court took into account a statutory provision that specifically disallowed judicial review in coming to its decision unless in contravention with a procedural requirement under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. This statutory provision is s. 7C(1) of the Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989 which states:

There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision.

[44] There is no such provision in the Act Therefore in coming to its decision, the Federal Court was confining itself to the statutory provision as narrated above. The Federal Court then did not at all make a ruling of general application that there is no right of hearing when that right is not stated as a procedural requirement. *In fact without such statutory constraint as seen in Lee Kew Sang, a right of hearing is a basic and fundamental right that should be accorded (see Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261).*

[45] *Further, the right of hearing is always available and enshrined without requiring it to be stated in any statutory provisions. The Federal Court was clear on this principle in Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MLJ 152* where Raja Azlan Shah FCJ after referring to several cases unequivocally said:

The cases show that a fair hearing is required as a 'rule of universal application', 'founded on the plainest principles of justice'. In particular, the silence of the statute affords no argument for excluding the rule, for the 'justice of the common law will supply the omission of the legislature.' These quotations are derived from the case of *Cooper v. Wandsworth Board of Works*, which has several times recently been approved by the House of Lords as expressing the principle in its full width: see *Ridge v. Baldwin; Wiseman v. Borneman* [1971] AC 297.

In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial' or 'administrative' or whether or not the enabling statute makes provision for a hearing. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown.

A [46] As indicated there is no dispute that the respondent did not give any right of hearing to the appellant before issuing the orders. This right should have been given following the decision above. Therefore, with respect the High Court erred in following *Lee Kew Sang* and not following *Ho Kwan Seng.*

B [47] *The proposition that a right of hearing need not be expressly provided in a statute is also seen in the Supreme Court's case of JP Berthelsen v. Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134.* in this case, Abdoolcader SCJ cited with approval the case of *Cooper v. Wandsworth Board of Works* (1863) 14 CBNS 180 at p. 194; (1863) 143 ER 414 at p. 420 that said:

C *... although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.*

[48] Thus, once again *the appellant should have been given the right to be heard by the respondent following what is stated in JP Berthelsen.* It is also relevant to note that this case also said:

D In the light of the authorities we have adumbrated, we regard the appellant as so circumstanced in relation to the action of the first respondent as to be entitled to the observance of the rules of natural justice. Whatever the grounds be upon which the first respondent was proceeding, the appellant might, in addition to attacking those grounds, also desire to refer to any matters of special hardship which the E cancellation of his employment pass would impose upon him and he should have been invited to do so. If, having done all this, the first respondent then gives consideration to the appellant's representations, the requirements of natural justice will have been satisfied and it would be for the first respondent to make his decision whether or not to cancel the employment pass in the exercise of the discretion conferred upon him F by reg. 19 of the Regulations.

[49] Following the above, *what should have been done by the respondent is to give the right of hearing to the appellant*. After this is provided and the respondent considers what is said by the appellant, only then would the requirements of natural justice be fulfilled.

G [50] *Also relevant to note is the fact the Act itself does not say that a right of hearing should be excluded. The right of hearing can be excluded as seen in s. 59 of the Immigration Act 1959/63 post JP Berthelsen. But since this was not the case for the Act, the appeliant must be given the right of hearing.*

...

H [63] *Besides, the authorities highlighted would indicate that the appellant must be given the right of hearing. Since this was not accorded by the respondent, it follows that the issuance of the respondent's orders cannot be defended.*

(emphasis added)

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[38] Additionally, the right to be heard is also guaranteed under the doctrine of legitimate expectation. The FC has ensured that the fundamental liberties of Malaysians are guaranteed in arts. 5 to 13, which encompasses the basic human rights principles as stated in the Universal Declaration of Human Rights ("UDHR"). The 30 rights and freedoms set out in the UDHR include the right to freedom of expression. The second respondent has established the Human Rights Commission of Malaysia and s. 4(4) of the Human Rights Commission of Malaysia Act 1999 provides that consideration must be given to the UDHR so far as it is not inconsistent with the FC. The second respondent's pledges and commitments given in support of various international norms such as the ASEAN Human Rights Declaration and the United Nations are highlighted to this court by the applicants. This court agrees that the international norms give rise to a legitimate expectation that the respondents will act in accordance with the same. There is no inconsistency between the written laws of this country and the international norms such as the ASEAN Human Rights Declaration and the United Nations. Even if the international norms have not been incorporated into our law, it does not mean that they hold no significance to Malaysian law. In *Minister Of State For Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 128 ALR 353, HC (Aus) the Australian High Court had held *inter alia* that in the event the respondents therein intend to act inconsistent with such norms, they must give the affected parties "an adequate opportunity of presenting a case against the taking of such a course". The Australian High Court held:

> But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course. So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated.

[39] The Court of Appeal in *CAS v. MPPL & Anor* [2019] 2 CLJ 454; [2019] 4 MLJ 243, has cited *Teoh* (*supra*) with approval where the court held:

> [33] That being said, where the law is ambiguous, the courts will still be charged with the duty to interpret local statutes in a manner where their 'language will be in conformity and not in conflict with international law'. This includes the development of common law 'by reference to statutory policy'. See *Noorfadilla bt Ahmad Saikin v. Chayed bin Basirun & Ors* [2012] 1 MLJ 832, at paragraph 29 citing Mason CJ of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 128 ALR 353, at page 363.

[40] It cannot be disputed that the applicants were not given the right to be heard before the ban. This court is of the considered view that the ban is indefensible and that the applicants' right to be heard has been violated.

[41] Lastly, it is the first respondent's contention that he is not required to give any reasons when he exercises his absolute discretion under s. 7(1) of the Act. It is of the considered view that the time has come for the public decision-making body to accept and realise that it is also a settled principle of public law and natural justice for them to give reasons for their decisions. Procedural fairness is part of our law, because of the terms of arts. 5(1) and 8(1) of the FC. The Federal Court in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265; [2018] 2 MLJ 590 has stated:

> [86] *It is also settled public law principle and principle of natural justice that a public decision-making body is under a duty to give reasons for its decision. Indeed, a reasoned decision can be an additional constituent of the concept of fairness (Rohana bt Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 and Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Ors [2005] 5 MLJ 193). The giving of reason is also one of the fundamentals of good administration.*
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> [87] *The absence of any provisions in the statute requiring the decision maker to give reasons ought not to be understood or taken to mean that there is no such duty to give reasons unless that very statute specifies that no reasons needs be given. The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large.*
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> [88] In a case where the decision is one that is straightforward and one that is not mired in circumstances that would invite further or deeper rationalisation, then perhaps the need to give reasons by the decision maker may not arise. The circumstances arising in the particular case may by implication, demand the imposition of a duty to give reasons. Lord Mustill in the House of Lords case of *Doody v. Secretary of State for the Home Department and other appeals* [1993] 3 All ER 92 said:
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> I accept without hesitation ... that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied. (emphasis added)

[42] In *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* [1997] 1 CLJ 665; [1996] 1 MELR 216, it was held that the combined effect of arts. 5(1) and 8(1) of the Federal Constitution "is to require all state action to be fair and just; and they strike at arbitrariness even in the discharge of administrative functions".

[43] A reasoned decision in a matter where freedom of expression and/or where fundamental liberties are being stifled must be given. Otherwise, it will violate the principles of procedural fairness guaranteed by art. 8 of the FC (see: *Zi Publications Sdn Bhd v. Timbalan Menteri Dalam Negeri & Ors* [2014] 2 MLRH 708).

Conclusion

[44] Premised on the above, the applicants' application was allowed with costs.